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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN JOHN HERRERA, Defendant and Appellant.	F076149 (Super. Ct. No. BF167870) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer and John S. Somers, Judges.†

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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† Judge Brehmer presided over appellant's sentencing hearing and Judge Somers presided over appellant's suppression hearing.

INTRODUCTION

Appellant Steven John Herrera was sentenced to prison for three years after he pleaded no contest to possessing a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)).[1] His appeal raises three issues.

First, the parties agree that a Fourth Amendment violation occurred when a dispatcher erroneously informed a probation officer that appellant could be searched. In fact, appellant's probation had ended about two weeks prior and the dispatcher made a calculation error when reviewing her database. However, because this error was the result of negligence and not police misconduct, we determine that the trial court properly applied the good faith exception to the exclusionary rule under *Herring v. United States* (2009) 555 U.S. 135 (*Herring*).

Second, we determine that the court properly conducted a review of records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Finally, we reject appellant's assertion that the court erred in imposing a penalty assessment attached to a drug program fee pursuant to section 11372.7, subdivision (a). However, we agree with the parties that the trial court improperly imposed a criminal laboratory analysis fee pursuant to section 11372.5, along with its accompanying penalty assessment. We direct the trial court to modify appellant's abstract of judgment to strike the criminal laboratory analysis fee and its accompanying penalty assessment. We otherwise affirm appellant's judgment.

BACKGROUND

The following facts were established during the hearing regarding appellant's motion to suppress.

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[1] All future statutory references are to the Health and Safety Code unless otherwise noted.

I. Officer Peña's Testimony.

On February 9, 2017, two officers from the Kern County Probation Department, Peña and Sillas, conducted a probation check at a particular residence in Delano, California. The subjects of their check, two brothers, were not home. Appellant, however, also lived in the residence and he was in his bedroom. Another female was present.

Appellant told Peña that he was not on probation. He appeared "a little agitated" and he was hesitant to leave his bedroom when he was directed to go to the living room. Sillas obtained appellant's name and he asked Peña to check on appellant's status. Peña contacted the dispatcher on his handheld radio. Peña could have used a computer in his vehicle to make this check. He testified that it was easier to have a dispatcher check the information. In addition, based on appellant's behavior, Peña was not comfortable leaving Sillas alone inside the residence with two individuals.

The dispatcher informed Peña that appellant was on active court probation, making him searchable for weapons and narcotics. Peña searched appellant's bedroom, finding a firearm and narcotics. At the hearing, Peña admitted that, other than the information from dispatch, he did not have any other basis to search appellant's room. He told the court that he had never before received incorrect information from dispatch.

Peña testified that he did not know the dispatcher personally. He did not know her name, and he did not recognize her voice. He had also never met appellant before. He denied harboring any type of "ill will" towards appellant.

II. The Dispatcher's Testimony.

The dispatcher testified at the hearing. She worked for the Kern County Sheriff's Department, but she was not a sworn peace officer.[2] She did not know Peña personally,

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[2] The Kern County Sheriff's Department has a contract to provide dispatch services for the probation department.

she did not recognize his name, and she knew him only by his department assigned call sign. When Peña asked her to check on appellant's status, the dispatcher checked two different databases, a local one and the California Law Enforcement Telecommunications System.

During her review of the databases, the dispatcher discovered that appellant had been placed on probation for three years. Appellant's probation started on January 27, 2014. At the time she spoke with Peña, the dispatcher had believed that appellant's probation was still in effect. She told Peña that appellant was on probation, and he could be searched for weapons, drugs and paraphernalia.[3]

At the hearing, the dispatcher testified that she had not realized she made an error until the day prior to her testimony in this matter. She agreed that, when she informed Peña about appellant's probation status, she had been aware of the current date. She said she "miscalculated the dates." However, she could not remember how or why the miscalculation occurred. She said she had worked as a dispatcher for 17 years. She knew she had one other instance where she gave an officer incorrect information.

The dispatcher testified that she did not know appellant. She had never come in contact with him before or seen him. She denied having any "ill will" towards him. She denied having any reason to provide false information to Peña in this matter.

III. The Trial Court's Ruling.

Following the presentation of testimony, the prosecutor conceded that appellant's Fourth Amendment rights had been violated. The prosecutor, however, argued that the "good faith" exception should apply to the exclusionary rule. The prosecutor relied on *Herring, supra,* 555 U.S. 135. According to the prosecutor, the dispatcher made a mistake, and there was no intentional conduct or systematic error.

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[3] At the hearing, the trial court received into evidence a copy of the information which the dispatcher had viewed.

The trial court determined it was appropriate under the circumstances that Peña had relied on the dispatcher and he had not gone outside to use his own computer in the vehicle. The court found the dispatcher's testimony credible. The court noted that it was possible the dispatcher had made other mistakes during her career that were not called to her attention. However, the court realized that the number of her other possible mistakes was likely low. The court commented that, when these events occurred, appellant's probation had ended about two weeks prior. The court believed that the dispatcher should have recognized that fact. The court was troubled that the dispatcher had made this math mistake, which the court characterized as not complex. The court, however, recognized the time pressures under which this communication occurred. The court found insufficient evidence to establish systematic error. The court determined that this matter was "very close to being on all fours" with *Herring*. According to the court, because the dispatcher's mistake was based on negligence, it was appropriate to apply *Herring*. The court denied appellant's motion to suppress.

DISCUSSION

I. The Trial Court Properly Denied Appellant's Motion To Suppress.

Appellant asserts that his suppression motion should have been granted. In the lower court, appellant established a prima facie showing that his Fourth Amendment rights were violated. As such, the burden rested on the prosecution to show the reasonableness of this warrantless search. (*People v. Jenkins* (2000) 22 Cal.4th 900, 972.) The prosecution, however, conceded the violation. Thus, we examine whether the trial court properly determined that the exclusionary rule did not apply in this situation.

A. The standard of review.

When analyzing a trial court's ruling on a motion to suppress, the trial court's determination of historical facts is reviewed under the deferential substantial evidence standard. However, the trial court's selection of the applicable rule of law and its

application of the law to the facts are reviewed independently. (*People v. Carter* (2005) 36 Cal.4th 1114, 1140.)

B. Analysis.

Appellant argues that the trial court erred in relying on *Herring*, which appellant claims is factually distinguishable. In the alternative, appellant contends that, even if *Herring* applies, the trial court failed to apply *Herring*'s balancing test. Appellant further asserts that systematic error caused the dispatcher's mistake. Appellant maintains that suppression is required to provide remedial corrective measures. He urges this court to reverse the lower court's ruling and find that the suppression motion should have been granted. He relies primarily on *People v. Willis* (2002) 28 Cal.4th 22 (*Willis*) to establish error. Appellant's various arguments and his reliance on *Willis* are unpersuasive.

1. An overview of the exclusionary rule.

"A warrantless search is unreasonable under the Fourth Amendment unless it is conducted pursuant to one of the few narrowly drawn exceptions to the constitutional requirement of a warrant." (*People v. Schmitz* (2012) 55 Cal.4th 909, 916.) A search authorized by probationary terms is such an exception. Such terms may permit a probationer "to submit to searches of their residences at any time of the day or night by any law enforcement officer with or without a warrant." (*People v. Woods* (1999) 21 Cal.4th 668, 675.)

The Fourth Amendment protects against unreasonable searches and seizures. However, when a violation occurs, the Fourth Amendment contains no express exclusionary provision. (*Arizona v. Evans* (1995) 514 U.S. 1, 10 (*Evans*).) Nonetheless, the United States Supreme Court has established an exclusionary rule. "Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." (*United States v. Calandra* (1974) 414 U.S. 338, 347.) Nevertheless, the exclusionary rule does not

necessarily apply just because a Fourth Amendment violation occurs. (*Herring, supra,* 555 U.S. at p. 140.) "Indeed, exclusion 'has always been our last resort, not our first impulse,' [citation], and our precedents establish important principles that constrain application of the exclusionary rule." (*Ibid*.)

The exclusionary rule applies only where it results in " ' "appreciable deterrence." ' " (*Herring, supra*, 555 U.S. at p. 141.) The exclusionary rule is not an individual right, and the focus is on whether implementing the rule will deter future Fourth Amendment violations. (*Herring,* at p. 141.) "In addition, the benefits of deterrence must outweigh the costs." (*Ibid.*) The rule should not be applied " 'in every circumstance in which it might provide marginal deterrence.' " (*Ibid.*) If it could provide some incremental deterrent, that possible benefit must be weighed against its social costs. (*Ibid.*) "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.' [Citation.]" (*Ibid*.)

2. We summarize the leading cases.

The parties dispute whether the United States Supreme Court's opinion in *Herring* controls, or whether we should rely upon the California Supreme Court's opinion in *Willis*. We summarize these cases, along with other relevant opinions, which are listed in their respective order of publication.

a. *United States v. Leon*.

In *United States v. Leon* (1984) 468 U.S. 897 (*Leon*), the United States Supreme Court held that evidence obtained in reliance on a defective search warrant is admissible if the searching officers' reliance on the warrant was objectively reasonable. (*Id.* at p. 926.) *Leon* set forth three important considerations: (1) the exclusionary rule is designed to deter police misconduct and not to punish judicial errors; (2) nothing suggests that judges and magistrates are inclined to ignore or subvert the Fourth

Amendment "or that lawlessness among these actors requires application of the extreme sanction of exclusion[;]" and (3) excluding this evidence would not have "a significant deterrent effect on the issuing judge or magistrate." (*Leon*, at p. 916.) The *Leon* court explained that judges and magistrates "are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." (*Id.* at p. 917.)

b. *Illinois v. Krull*.

In *Illinois v. Krull* (1987) 480 U.S. 340 (*Krull*), the high court used a similar analysis in finding the good faith exception applicable when "officers act in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches," and the statute is later "found to violate the Fourth Amendment." (*Id.* at p. 342.) The court reasoned that excluding evidence obtained under these circumstances would have little deterrent effect. (*Id.* at p. 349.) "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." (*Id.* at pp. 349–350.) The high court elaborated that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " (*Id.* at pp. 348–349, quoting *United States v. Peltier* (1975) 422 U.S. 531, 542.)

c. *Evans*.

In *Evans, supra,* 514 U.S. 1, the defendant was arrested and searched on the basis of an erroneous report that a misdemeanor warrant was outstanding. A court employee may have been responsible for the clerical error. (*Evans*, at pp. 4–5.) The *Evans* court

held that the reasoning of *Leon* applied. "If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction." (*Evans*, at p. 14.) The *Evans* court noted that court clerks are not adjuncts to the law enforcement team. (*Id.* at p. 15.) Further, nothing indicated that the arresting officer "was not acting objectively reasonably when he relied upon the police computer record." (*Id.* at pp. 15–16.)

d. *Willis*.

In *Willis, supra,* 28 Cal.4th 22, a parole record mistakenly showed that the defendant was on parole, but he had actually been discharged from parole months earlier. (*Id.* at pp. 26–28.) Despite the fact the defendant denied being on parole and presented documentation to the officers that he had been discharged from parole, a parole officer and a police officer searched the defendant's motel room. (*Id.* at p. 27.) The search uncovered narcotics and narcotics paraphernalia. (*Ibid.*) The record did not establish why the parole error had occurred. However, it was either the fault of the parole officer who directed the search, or a parole system data entry clerk, who was responsible for maintaining accurate parole records. (*Id.* at p. 35.) The defendant's suppression motion was denied. (*Id.* at p. 28.)

The California Supreme Court held that the good faith exception to the exclusionary rule was inapplicable. (*Willis, supra,* 28 Cal.4th at p. 38.) The police officer's and the probation officer's reliance on the erroneous parole record was not objectively reasonable. Neither of them made any attempt to verify the defendant's parole status by other means prior to conducting the search. (*Id.* at p. 43.) Furthermore, regardless of the source of the error, the *Willis* court found it was attributable to the entire law enforcement team, which included the parole officer and the data entry clerk. (*Id.* at pp. 38–39, 45.) Thus, the fact that the defendant had been discharged from parole prior to the search was within the collective knowledge of the law enforcement team, which

precluded the application of the good faith exception. (*Id.* at p. 46.) The *Willis* court concluded that suppression of the evidence was consistent with the deterrence goal of the exclusionary rule by providing an incentive to law enforcement officials to maintain accurate parole records. (*Id.* at pp. 48–49.)

e. *Herring*.

In *Herring, supra,* 555 U.S. 135, officers in one county arrested the defendant based on a warrant listed in a neighboring county's sheriff department's computer database. The defendant was searched incident to arrest, and the officers found drugs and a gun. (*Id.* at p. 137.) It was subsequently discovered that the warrant had been recalled months earlier, although that information was never entered into the sheriff department's database. (*Id.* at pp. 137–138.) The defendant was indicted on gun and drug possession charges, and he moved to suppress the evidence. (*Id.* at p. 138.) His suppression motion was denied. (*Ibid.*)

The United States Supreme Court upheld the denial of the suppression motion. (*Herring, supra,* 555 U.S. at p. 147.) According to the majority opinion, the error resulted from "isolated negligence attenuated from the arrest." (*Id.* at p. 137.) The *Herring* court concluded that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Id.* at p. 144.) However, where, as here, "police mistakes are the result of negligence … rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' [Citation.] In such a case, the criminal should not 'go free because the constable has blundered.' [Citation.]" (*Id.* at pp. 147–148.) The *Herring* court emphasized, that to claim the benefits of the good faith exception, the

police must have acted " 'in objectively reasonable reliance' " on factually incorrect information or subsequently invalidated warrants or statutes. (*Id.* at pp. 142, 146.)

3. Under *Herring*, the trial court properly denied appellant's motion to suppress.

Appellant's reliance on *Willis* is misplaced. As our Supreme Court noted in *Willis*, "Federal constitutional standards generally govern our review of claims that evidence is inadmissible because it was obtained during an unlawful search." (*Willis, supra,* 28 Cal.4th at p. 29.) Subsequent to *Willis*, *Herring* has articulated the applicable federal constitutional standards. "On matters of federal constitutional law, of course, we are bound by the decisions of the United States Supreme Court." (*Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 692.) Under these circumstances, we will follow *Herring*'s more recent guidance.[4]

Appellant contends that the dispatcher was an arm of law enforcement. This is a point which respondent does not address. For purposes of our analysis, we will presume that the dispatcher was an adjunct to the law enforcement team. (See *Willis, supra,* 28 Cal.4th at p. 44 [determining that data entry clerks for the California Department of Corrections were "adjuncts to the law enforcement team"].) However, even when we consider the dispatcher as a member of the law enforcement team, we agree with the trial court that the good faith exception to the exclusionary rule applied in this case.

The United States Supreme Court makes it clear that applying the exclusionary rule "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." (*Herring, supra,* 555 U.S. at p. 137; see also *Krull*, *supra,* 480 U.S. at p. 350; *Leon, supra,* 468 U.S. at p. 916.) We use an "objective reasonableness" standard when analyzing the good faith exception to the exclusionary rule. (*Herring*,

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[4] Likewise, appellant cites *People v. Hill* (2004) 118 Cal.App.4th 1344 and *People v. Ferguson* (2003) 109 Cal.App.4th 367, which applied *Willis*. In light of *Herring*, however, we need not address or analyze either of these earlier appellate opinions.

supra, 555 U.S. at p. 145 [the "pertinent analysis of deterrence and culpability is objective"]; *Evans*, *supra*, 514 U.S. at pp. 15–16 [holding the officer's reliance on database objectively reasonable]; *Krull*, *supra*, 480 U.S. at pp. 358–359.)

Here, the trial court determined that Peña appropriately relied on the dispatcher and elected not to review this information himself on his own computer in the vehicle. The court also found the dispatcher's testimony credible. We will give deference to the court's findings because substantial evidence supports them. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1140.)

The officers acted in objectively reasonable reliance on the factually incorrect information provided by the dispatch clerk. Nothing established or even reasonably suggested that the officers may have believed the dispatcher's information was erroneous. Further, the testimony from the suppression hearing conclusively demonstrated that the dispatcher's error was based on negligence. The dispatcher made a mathematical mistake when reviewing appellant's probationary status. Nothing in the record suggests that either the officers or the dispatch clerk acted with a "deliberate, reckless, or grossly negligent" disregard for appellant's Fourth Amendment rights. (See *Herring*, *supra*, 555 U.S. at p. 144.)

We disagree with appellant that, even if the dispatcher's error was objectively unreasonable, the harsh sanction of exclusion is required. To the contrary, the focus of the exclusionary rule is on deterring police misconduct. (*Krull*, *supra*, 480 U.S. at p. 350; *Leon*, *supra*, 468 U.S. at p. 916.) In *Krull*, the United States Supreme Court stated that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " (*Krull*, *supra*, 480 U.S. at pp. 348–349, quoting *United States v. Peltier*, *supra*, 422 U.S. at p. 542.) As *Herring* stated, "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." (*Herring*, *supra*, 555 U.S. at p. 143.) "An error that arises

from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place." (*Id.* at p. 144.)

This record does not demonstrate police misconduct. The dispatcher's error was one of isolated negligence. As such, the abuses which gave rise to the exclusionary rule are not present. (*Herring*, *supra*, 555 U.S. at p. 143.) The good faith exception to the exclusionary rule should apply. (*Id.* at pp. 147–148.)

Appellant cites an opinion from the Supreme Court of New Jersey, *State v. Handy* (2011) 206 N.J. 39 (*Handy*), as an example of at least one court refusing to apply *Herring*'s rationale to a dispatcher's personal mistake. In *Handy*, a dispatcher erroneously advised an officer that the defendant had an outstanding warrant. In fact, the dispatcher's warrant information contained a differently spelled name and a different date of birth. The *Handy* court determined that a constitutional violation occurred because the dispatcher's conduct was objectively unreasonable. As such, suppression of the evidence uncovered during the search incident to the defendant's arrest had to be suppressed. (*Id.* at pp. 41–42.)

Handy is distinguishable because it involved a far more egregious error than what occurred here. Indeed, the mistake in *Handy* could be classified as one of gross negligence. (See *People v. Costa* (1953) 40 Cal.2d 160, 166 [gross negligence is " ' "the want of slight diligence," "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and "that want to care which would raise a presumption of the conscious indifference to consequences" ' "].) In contrast, the dispatcher in this matter made a simple calculation mistake, and it is clear that she tried to provide correct information to the officer. In any event, out-of-state opinions are not binding on California courts. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 490; accord *Arteaga v. Superior Court* (2015) 233 Cal.App.4th 851, 868.) For these reasons, *Handy* does not compel reversal of appellant's judgment.

4. Deterrence was not required under these circumstances.

Appellant argues that suppression of his evidence was required to deter future mistakes. He also contends that reversal is necessary because the trial court failed to balance the culpability of the conduct in this matter against the efficacy of excluding the evidence in deterring future police misconduct. These arguments are without merit.

Because the exclusionary rule is a "remedial device," its application is "restricted to those situations in which its remedial purpose is effectively advanced." (*Krull*, *supra*, 480 U.S. at p. 347.) Thus, application of the exclusionary rule " 'is unwarranted' " where it would " 'not result in appreciable deterrence.' " (*Evans*, *supra*, 514 U.S. at p. 11.) The *Herring* court stated that "[t]he pertinent analysis of deterrence and culpability is objective," and not based on the officers' subjective awareness. (*Herring*, *supra*, 555 U.S. at p. 145.) "We have already held that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.' [Citation.]" (*Ibid*.) *Herring* made it clear that recordkeeping errors by police may fall under the exclusionary rule. However, the conduct at issue must be objectively culpable. The *Herring* court determined that, when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant, the marginal or nonexistent benefits produced by suppressing that evidence cannot justify the substantial costs of exclusion. (*Id.* at p. 146.) On the other hand, if it is shown that the police have been reckless in maintaining its warrant system, or they knowingly made false entries in preparation for future arrests, then exclusion would be justified if the Fourth Amendment was violated. (*Herring*, at p. 146.)

In this matter, the facts from the suppression hearing conclusively established that a well-trained officer in the position of Sillas or Peña would not have known that the search of appellant's room was illegal. The officers' conduct in this matter was not objectively culpable. Further, nothing established or even reasonably suggested that the

dispatcher knowingly made a false representation, or that her mistake was based on anything other than ordinary negligence. The evidence overwhelmingly suggests that the dispatcher made a good faith effort to provide correct information to the officer. The marginal or nonexistent benefits produced by suppressing appellant's evidence based on the dispatcher's isolated mathematical error cannot justify the extreme cost of exclusion. (See *Herring*, *supra*, 555 U.S. at p. 146.) Because suppression would not result in appreciable deterrence, application of the exclusionary rule is unwarranted in this situation. (See *Evans*, *supra*, 514 U.S. at p. 11.) Although the trial court did not articulate all of the factors discussed in *Herring* and other United States Supreme Court opinions, our independent review establishes that exclusion was not warranted. The benefits of deterrence do not outweigh the costs.

5. Systematic error was not established.

During the hearing, the dispatcher testified that, because of staffing shortages (down 60 percent), she often worked overtime. The prosecutor asked her: "And about how many of those 17 years would you estimate that have been overtime status where you're doing about 20 to 30 extra hours a week?" The dispatcher answered, "At least 70."

Appellant asserts that this mistake was the result of systematic error. According to appellant, the dispatcher worked long hours. Appellant claims that the dispatcher's quoted answer shows her "impaired cognitive function." He contends that her answer showed her belief that she had worked the past 70 years. He also notes that the dispatcher admitted making one other mistake during her career. He maintains that all of this established systematic negligence. These arguments are meritless.

As an initial matter, we reject appellant's assertion that the dispatcher demonstrated impaired cognitive abilities. Nothing from her testimony established or even reasonably suggested any mental deficiencies. Further, the dispatcher never

testified that she made this mistake because of her working conditions, because of particular employer policies, or because she worked overtime. To the contrary, she stated that she simply "miscalculated the dates." Although she admitted making one other mistake during her 17-year career, we cannot state that the circumstances demonstrate a larger ongoing problem. Instead, the record overwhelmingly establishes that this was an isolated occurrence of negligence and not part of any systematic error.

6. Conclusion.

In *Willis*, our Supreme Court held that, when the prosecution invokes the good faith exception, the government bears the burden to establish its application. (*Willis*, *supra*, 28 Cal.4th at pp. 36–37.) While the United States Supreme Court decision in *Herring* has arguably redefined the type of law enforcement culpability that qualifies under the good faith exception, *Herring* did not address the burden of proof. The holding in *Willis* regarding the burden of proof appears unaffected by *Herring*.

Based on this record, this Fourth Amendment violation occurred after the officers acted in objectively reasonable reliance on incorrect information regarding appellant's probationary status. (See *Herring, supra*, 555 U.S. at p. 142.) The error was the result of the dispatcher's ordinary negligence. Exclusion is not warranted under these circumstances because deliberate, reckless, or grossly negligent conduct did not occur. Further, recurring or systematic negligence was not established. (See *Herring*, *supra*, at p. 144.) As such, the prosecution met its burden in establishing that the good faith exception to the exclusionary rule applied. Accordingly, the trial court properly denied appellant's motion to suppress, and this claim fails.

II. The Trial Court Properly Conducted The *Pitchess* Review.

Appellant requests that we independently review the in camera *Pitchess* hearing that the trial court conducted. Respondent does not object to the extent the *Pitchess* request was limited to evidence related to appellant's suppression motion.

A. Background.

Prior to trial, appellant filed a *Pitchess* motion pursuant to Evidence Code section 1043 seeking information about complaints regarding probation officers Sillas, Peña and Zachary.[5] The request sought information about complaints involving (1) false statements in reports; (2) fabrication of witness testimony in reports; (3) false testimony; (4) falsification of probable cause and/or reasonable suspicion; (5) acts involving moral turpitude; (6) use of excessive force; (7) aggressive conduct; (8) unnecessary violence; (9) unnecessary force; and (10) any other evidence of or complaints of dishonesty or excessive force. The trial court granted appellant's motion and, on July 6, 2017, it conducted an in camera review.

A court reporter was present during the closed hearing. A custodian of records for the Kern County Probation Department was sworn and testified. The custodian stated that he had reviewed appellant's *Pitchess* motion and he had searched for potentially responsive records. The custodian testified that he had located and brought with him responsive documents for Sillas, Peña and Zachary.

The trial court stated that it had reviewed the materials. According to the court, the documents did not contain anything responsive to appellant's *Pitchess* motion. As such, the court ruled that there was nothing to disclose.

On November 21, 2017, the trial court issued a confidential ruling which was filed with this court. The ruling indicated that the judge who had presided over appellant's *Pitchess* hearing had reviewed the court reporter's transcript of the in camera hearing and the materials supplied by the custodian of records. The court marked as exhibits 1 and 2 the documents provided by the Kern County Sheriff's Department. Those exhibits contained the same documents which the court had reviewed during the in camera

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[5] During the preliminary hearing, officer Zachary testified that she was dispatched to appellant's residence after Peña discovered the narcotics and firearm in appellant's room. She spoke with appellant at the residence.

hearing. The court indicated that it had not reviewed any other documents during the *Pitchess* hearing.

In December 2017, copies of Sillas's, Peña's, and Zachary's personnel files were sealed and filed with this court as exhibits 1 and 2. Accompanying those records was a declaration under penalty of perjury from a custodian of records for the Kern County Probation Department. The declaration indicated that these documents reflected the materials which the trial court had reviewed on July 6, 2017.

B. The standard of review.

" 'A criminal defendant has a limited right to discovery of a peace officer's personnel records. [Citation.] Peace officer personnel records are confidential and can only be discovered pursuant to Evidence Code sections 1043 and 1045.' [Citation.]" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 180 (*Yearwood*).) "A defendant is entitled to discovery of relevant information from the confidential records upon a showing of good cause, which exists 'when the defendant shows both " 'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought." [Citation.]' [Citation.]" (*Id.* at p. 180.)

When the court finds good cause and conducts an in camera review pursuant to *Pitchess*, it must make a record that will permit future appellate review. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229–1230 (*Mooc*).) A custodian is not required to present to the trial court any documents that are "clearly irrelevant" to the *Pitchess* motion. (*Mooc*, *supra*, at p. 1229.) However, if the custodian has any doubt, those documents should be presented to the trial court. (*Ibid.*) "The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion."

(*Ibid.*) A court reporter should memorialize the custodian's statements and any questions asked by the trial court. (*Ibid.*)

C. Analysis.

We have reviewed the trial court's in camera examination of Sillas's, Peña's and Zachary's personnel files. The trial court complied with the procedural requirements of a *Pitchess* hearing. A court reporter was present, and the custodian was sworn prior to testifying. (*Yearwood*, *supra*, 213 Cal.App.4th at p. 180.)

We have reviewed the sealed personnel files for all three individuals. Nothing in these records was subject to disclosure under *Pitchess*. None of these materials involved (1) false statements in reports; (2) fabrication of witness testimony in reports; (3) false testimony; (4) falsification of probable cause and/or reasonable suspicion; (5) acts involving moral turpitude; (6) use of excessive force; (7) aggressive conduct; (8) unnecessary violence; (9) unnecessary force; and (10) any other evidence of or complaints of dishonesty or excessive force.

Based on this record, the superior court properly conducted the *Pitchess* hearing. The court reviewed the provided records. None of the records were responsive to appellant's *Pitchess* motion. Accordingly, the court did not abuse its discretion in declining to disclose these materials.

III. We Will Strike Imposition Of The Criminal Laboratory Analysis Fee And Its Penalty Assessment.

Appellant was sentenced to prison for three years for possession of certain controlled substances while armed with a firearm in violation of section 11370.1, subdivision (a). At sentencing, the trial court noted that some "fees and fines" appeared in the probation report, and the court asked appellant if he agreed with them. Appellant said, "Yes, sir." His trial counsel joined in that agreement, and the court imposed the listed fees and fines. These included a $50 criminal laboratory analysis fee pursuant to

section 11372.5, along with a $155 penalty assessment. This also included a $100 drug program fee pursuant to section 11372.7, along with a $310 penalty assessment.

On appeal, the parties agree that the trial court improperly imposed the $50 criminal laboratory analysis fee pursuant to section 11372.5, along with the accompanying $155 penalty assessment. We agree with the parties. The only offenses for which the criminal laboratory analysis fee may be imposed are those listed in section 11372.5, subdivision (a). (*People v. Myles* (2016) 6 Cal.App.5th 1158, 1160.) Appellant's conviction under section 11370.1 is not one of the listed offenses. (§ 11372.5, subd. (a).) Accordingly, this fee and its accompanying penalty assessment must be stricken.[6]

The parties, however disagree whether the $310 penalty assessment was properly assessed in connection with the $100 drug program fee pursuant to section 11372.7, subdivision (a). Appellant does not dispute that the trial court properly imposed the drug program fee. Instead, he argues that the accompanying penalty assessment was inappropriate.

This issue turns on whether section 11372.7 represents a fee or a fine. "Additional penalties, or assessments, are imposed under California law upon every fine, penalty or forfeiture imposed and collected by the courts for criminal offenses. This requirement is mandated by Penal Code section 1464 and Government Code section 76000." (*People v. Sierra* (1995) 37 Cal.App.4th 1690, 1694 (*Sierra*).)

At the time the parties submitted their briefing, the Court of Appeal was split on whether a drug program fee requires a penalty assessment. In *Sierra*, this court had determined that section 11372.7 represents a "fine and/or a penalty to which the penalty

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6 We agree with respondent that, although appellant failed to object at sentencing, forfeiture did not occur. An unauthorized sentence may be raised for the first time on appeal. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) As such, we need not address appellant's alternative argument that his counsel rendered ineffective assistance.

assessment provisions of Penal Code section 1464 and Government Code section 76000 apply." (*Sierra, supra,* 37 Cal.App.4th at p. 1696.)

After the parties submitted their briefing in this matter, our Supreme Court considered whether the drug program fee (§ 11372.7, subd. (a)) and the criminal laboratory analysis fee (§ 11372.5, subd. (a)) constituted "punishment," rendering it permissible to impose these two fees on a defendant who had committed a conspiracy to commit a drug offense that was specified in the statute establishing these two fees. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1104 (*Ruiz*).) The conspiracy statute provides that those convicted of conspiring to commit a felony "shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony." (Pen. Code, § 182, subd. (a)(6).) After considering the legislative history of the statutes enacting both fees, the *Ruiz* court determined that the fees constituted punishment and could be imposed in conspiracy cases.[7] (*Ruiz, supra*, at p. 1119.)

Prior to *Ruiz*, at least four appellate opinions had held that laboratory and program fees were not fines, penalties or forfeitures. *Ruiz*, however, determined that, based on its analysis, it was "clear" that the Legislature had intended the fees under section 11372.7, subdivision (a), and section 11372.5, subdivision (a), to be punishment. (*Ruiz, supra*, 4 Cal.5th at p. 1122.) To the extent they were inconsistent with its analysis and conclusion, *Ruiz* disapproved those four opinions which appellant had cited in his briefing for this issue: (1) *People v. Martinez* (2017) 15 Cal.App.5th 659; (2) *People v. Webb* (2017) 13 Cal.App.5th 486; (3) *People v. Watts* (2016) 2 Cal.App.5th 223; and (4) *People v. Vega* (2005) 130 Cal.App.4th 183. (*Ruiz, supra*, 4 Cal.5th at p. 1122, fn. 8.)

Although *Ruiz* determined that section 11372.7, subdivision (a) and section 11372.5, subdivision (a) constituted "punishment," it did not address whether a penalty

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[7] *Ruiz* reviewed and affirmed an unpublished opinion issued by this court. (*People v. Ruiz* (May 19, 2016, F068737) 2016 Cal. App. Unpub. LEXIS 3742.)

assessment should be levied for these statutes. Instead, shortly before oral argument in *Ruiz*, the defendant filed a request to submit supplemental briefing on two additional issues, including whether the criminal laboratory analysis fee and the drug program fee are subject to penalty assessments. (*Ruiz, supra,* 4 Cal.5th at p. 1122.) The *Ruiz* court denied the defendant's request, but it left it to this court "to decide how to address these issues on remand should defendant elect to pursue them." (*Ibid.*) However, the issue of penalty assessments was not pursued when the *Ruiz* matter returned to this court. (*People v. Ruiz* (Oct. 10, 2018, F068737) 2018 Cal. App. Unpub. LEXIS 7101, at *4.)

In any event, under *Ruiz*'s analysis, it is clear that the drug program fee pursuant to section 11372.7, subdivision (a), must be considered a fine, penalty, or forfeiture. Indeed, *Ruiz* held that this fee constituted a punishment. (*Ruiz, supra,* 4 Cal.5th at p. 1119.) As such, we see no reason to deviate from this court's earlier decision in *Sierra*. Therefore, section 11372.7 represents "a fine and/or a penalty to which the penalty assessment provisions of Penal Code section 1464 and Government Code section 76000 apply." (*Sierra, supra,* 37 Cal.App.4th at p. 1696.) Accordingly, we reject appellant's assertion that the trial court improperly imposed the $310 penalty assessment accompanying the drug program fee under section 11372.7, subdivision (a).

DISPOSITION

The judgment is modified to strike the $50 criminal laboratory analysis fee imposed pursuant to section 11372.5, along with its accompanying $155 penalty assessment. Upon issuance of the remittitur, the trial court shall amend the abstract of

judgment to reflect that this fee and accompanying penalty assessment were stricken. The court shall forward an amended abstract of judgment to the appropriate authorities. In all other respects, appellant's judgment is otherwise affirmed.

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LEVY, Acting P. J.

WE CONCUR:

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POOCHIGIAN, J.

_____
MEEHAN, J.